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Nos. 80-847 and 80-1067
(Consolidated)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

and

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
SECTION 9012(f) OF THE FUND ACT VIOLATES THE FIRST AMENDMENT	4
A. Independent Political Committees Are Denied Meaningful First Amendment Rights In Presidential Campaigns By Section 9012(f)	4
B. Section 9012(f)'s Restraints Upon Independent Political Committees Operate To Deny Many Citizens Meaningful First Amendment Rights	5
C. The Burdens Placed Upon The Constitutional Right of Free Expression By Section 9012(f) Are Not Justified By A Governmental Interest In Eliminating Corruption From The Electoral Process	14
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5, 13

Grayned v. City of Rockford, 408 U.S. 104 (1972) 7

Lanzetta v. State of New Jersey, 306 U.S. 451 (1939) 7

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) .. 7

Republican National Committee v. Federal Election Commission, 487 F.Supp. 280 (S.D. N.Y.) *aff'd mem.* 445 U.S. 955 (1980) 4

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment ..... *passim*

STATUTES:

2 U.S.C. § 431(9)(B)(viii) 11

Former 18 U.S.C. § 608(e)(1) 5, 9

26 U.S.C. § 9002(9) 6

26 U.S.C. § 9012(f) ..... *passim*

26 U.S.C. § 9012(f)(1) 4

REGULATIONS:

11 C.F.R. § 100.8(b)(16)(iii) 11

MISCELLANEOUS:

The Gallup Opinion Index, 63-65 (No. 183, Dec. 1980) 2

The New York Times, April 26, 1981, § 1, at 22 13

The Washington Post, May 6, 1981, at A6 ... 13

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INTEREST OF AMICUS CURIAE

Through this brief Southeastern Legal Foundation, Inc. ("Southeastern"), supports the interests of citizens adversely affected by the restraints of 26 U.S.C. § 9012(f), Section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act"). That statute

interferes with the First Amendment rights of individuals who exercise their political freedoms in presidential campaigns by expressing themselves through the mechanism of independent political committees not controlled by candidates or their authorized committees, including official party committees.

A large body of citizens is actually and potentially restrained in their exercise of constitutional rights by Section 9012(f). Many individuals, including some of Southeastern's trustees, officers and contributors, participated in the 1980 presidential campaign and expressed themselves by supporting and making possible the activities of various independent political committees. According to the Gallup Poll, recent data, covering the period of October through December, 1980, indicates that thirty-one percent of citizens identify themselves as "independent", rather than as Democrat or Republican. *The Gallup Opinion Index*, 63-65 (No. 183, Dec. 1980). With such a high percentage of Americans identifying themselves as independents, the potential for continued and possibly increased independent political committee activity is significant.

In view of the broad impact of Section 9012(f), Southeastern has participated in this litigation by submitting amicus curiae briefs to the District Court and by urging this Court to note probable jurisdiction and to affirm. The parties have consented to the filing of this brief and copies of their consent letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Protecting the freedom to communicate one's views in the political process of presidential elections is a key function of the First Amendment. To have meaningful impact in today's presidential contests, speech must be communicated through costly mass media. Although some wealthy individuals could afford to spread their views through such media, most citizens can achieve meaningful political speech only by associating with others. Many choose to associate for that purpose through independent political committees.

The limitation upon expenditures of independent political committees imposed by Section 9012(f) effectively deprives many citizens of the opportunity to express their political thoughts in a meaningful manner. This restraint has the consequence of giving greater weight to the views of wealthy citizens who are not limited by independent political committee restraints because they can afford to purchase the media exposure to widely disseminate their views.

By preventing effective association of individuals through independent political committees, Section 9012(f) unconstitutionally enhances the voices of some at the expense of others. It operates to burden core First Amendment rights of freedom of speech and freedom of association.

Substantial interference with constitutional liberties can only be justified by a compelling governmental interest through a statute narrowly tailored to achieve its purpose. Section 9012(f) does not satisfy these strict requirements. Consistent with past decisions,

this Court should affirm the opinion below and hold that Section 9012(f) violates the First Amendment.

ARGUMENT

SECTION 9012(f) OF THE FUND ACT VIOLATES THE FIRST AMENDMENT

Southeastern believes the District Court was correct in holding that Section 9012(f) of the Fund Act violates fundamental First Amendment rights of freedom of speech and freedom of association. The decision below is consistent with this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*"Buckley"*) and last year's decision in *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280 (S.D. N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

A. Independent Political Committees Are Denied Meaningful First Amendment Rights In Presidential Campaigns By Section 9012(f).

The $1,000 limitation upon expenditures by independent political committees contained in Section 9012(f)[1] operates as an effective bar to meaningful

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[1] Section 9012(f)(1) states, in relevant part, that:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate, in an aggregate amount exceeding $1,000.

free expression by such committees in presidential campaigns. In light of an increasing dependence by the electorate upon the mass media for news and information, this Court has noted that "these expensive modes of communication [are] indispensable instruments of effective political speech." *Buckley, supra* at 19. Ruling unconstitutional a $1,000 limitation upon independent expenditures contained in former 18 U.S.C. § 608(e)(1), this Court held that the limitation appeared "to exclude all citizens and groups, except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." *Id.* (footnotes omitted).

Five years have passed since that decision and $1,000 buys considerably less now than it did in 1976. If this Court continues to hold, as Southeastern believes it should, that use of expensive mass media such as television, radio, and newspapers is a prerequisite to meaningful political speech by individuals and groups, Section 9012(f)'s $1,000 limitation upon expenditures by independent political committees should be regarded as depriving those committes of "the type of speech indispensable to decisionmaking in a democracy . . .." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

B. Section 9012(f)'s Restraints Upon Independent Political Committees Operate To Deny Many Citizens Meaningful First Amendment Rights.

In order to justify Section 9012(f)'s burdens upon First Amendment rights, appellants Common Cause and Federal Election Commission ("F.E.C.") argue

that Section 9012(f) does not prevent individuals and informal groups of individuals from engaging in unrestricted free speech on behalf of presidential candidates. To fully understand the impact of Section 9012 (f), one must go beyond the literal language of the statute, the spot where appellants have stopped, and examine how it works in the real world.

Section 9012(f) applies its sanctions upon "political committees". According to 26 U.S.C. § 9002(9), a political committee is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State or local elected office.

Since this language does not include individuals, appellants assert that "individuals (and groups of individuals acting jointly) [are] free to make unlimited independent expenditures in Presidential campaigns." Common Cause Brief, 38. See F.E.C. Brief, 42, 45-46.

While individuals and perhaps certain groups[2] do

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[2] Both appellants assume that "informal" groups of individuals are not covered by the statutory definition of "political committee." See, F.E.C. Brief, 45-46; Common Cause Brief, 35, 38. However, the language of 26 U.S.C. § 9002(9), "any committee, association, or organization (whether or not incorporated) . . .," read literally would cover all groups or entities consisting of more than one individual. If Section 9012 (f) does exclude certain groups from its coverage, that is not clear from either Section 9012(f) or 26 U.S.C. § 9002(9). The

retain the freedom to make unrestricted expenditures, not all individuals and groups are in a position to take advantage of this unrestrained freedom of speech. The great costs involved with meaningful speech permit only the most wealthy individuals to take advantage of their freedom to express themselves effectively in presidential campaigns.

Inexplicably blind to the economic realities facing most citizens, appellants speak as though the unrestricted individual option is readily exercisable by all persons. Common Cause states that "*everyone* can find numerous ways to support publicly financed candidates consistently with Section 9012(f). For example, individuals (acting either singly or jointly) can purchase advertisements in local newspapers . . . [and] can purchase local billboard space . . .." Common Cause Brief, 40 (emphasis added). In this context, Common Cause comments that individuals can "purchase advertisements in more expensive, nationally circulated newspapers, since the Fund act imposes no ceiling on independent expenditures by individuals." *Id.*, n. 66. How *everyone*, rich, poor and middle income can en-

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legislative history pointed to by Common Cause, see Common Cause Brief, 35-36, is of no help in further defining the scope of Section 9012(f). The unclear range of Section 9012(f)'s coverage invites unwitting violation of its prohibition by the innocent who are not provided fair warning. *See*, Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Particularly here, where First Amendment freedoms are affected, more specificity in the statute should be required. *See*, N.A.A.C.P. v. Button, 371 U.S. 415, 433, 438 (1963). Southeastern believes there is ample basis for invalidating Section 9012(f) because it is vague as to which groups it covers and which it does not. *See*, Lanzetta v. State of New Jersey, 306 U.S. 451 (1939).

gage in this free speech is not explained.

F.E.C. is likewise insensitive to the implications of its own arguments. In a criticism of appellee independent political committees, F.E.C. says that they "are clearly not like a *wealthy* individual or like groups of individuals who retain control over the spending of their own funds to support candidates." F.E.C. Brief, 45 (emphasis added).

In fact, most individuals do not have the financial ability to exercise their freedom in the manner contemplated by appellants. The only way most citizens can obtain effective political speech in presidential elections is to associate with citizens of similar economic means in order to pool the resources necessary to purchase costly media.

Both appellants insist that "informal" groups must involve citizens retaining "control" over the groups' funds without any relinquishment of "control" to some decision-maker. F.E.C. Brief, 45-46; Common Cause Brief, 36. This approach may work for a few wealthy individuals, but is totally impractical for larger groups. Although it might be feasible for five millionaires to travel together to a television station in order to buy $50,000 worth of advertising with cash out of their own pockets, 500 persons able to put up only $100 each could not achieve that feat. An organization involving delegated authority would be necessary for them to make similar purchases. While such an organization may not permit each supporting individual to retain direct control over every detail and decision of the group, surely the necessity of sharing responsibility, which arises out of the financial limita-

tions of the individuals involved, should not be a reason for denying the group as a whole the opportunity of exercising effective free speech. To subject a group to the restrictions of Section 9012(f) because it does not function like the model appellants have described has no basis in the statute itself, and would penalize individuals for not being wealthy enough to exercise the sort of joint control appellants demand.

Given the economic reality which makes independent political committees necessary for many individuals who wish to have effective political speech, and given the unavailability of informal group activity within the boundaries set by appellants, Section 9012(f) must be considered to restrain individual rights as surely as it restricts independent political committee rights.

This view is consistent with conclusions already reached by this Court. In *Buckley*, this Court invalidated a provision of the Federal Election Campaign Act[3] which limited independent expenditures to $1,000 "relative to a clearly identified candidate" in federal campaigns, saying that it "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First

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[3] The section in question, former 18 U.S.C. § 608(e)(1), provided that:

> No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (e)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the calendar year advocating the election or defeat of such candidate, exceeds $1,000.

Amendment protection of the freedom of association." *Buckley, supra,* at 22. In this context, "constraints on the ability of independent associations . . . to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents,' *Sweezy v. New Hampshire,* 354 U.S. 234, 250 . . . (1957) (plurality opinion)." *Id.*

Without the option of unrestricted independent expenditures, many individuals and groups would be denied the opportunity to "effectively amplify" their political views in presidential campaigns. To this extent they would be at a disadvantage as compared to the small number of citizens who could afford to "effectively amplify" their views. Such a disadvantage would be constitutionally impermissible. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley, supra* at 49. Congress may not "restrict the speech of some elements in our society in order to enhance the relative voice of others." *Id.* at 48-49. Yet, that is the effect of Section 9012(f) and it therefore deprives most citizens of the option of meaningful speech through unrestricted individual activity.

Appellants also assert that ample First Amendment opportunities are provided by the various candidate-related and party-related options allowed by federal law. Both F.E.C. and Common Cause point out that individuals may contribute their volunteer services to their chosen candidates or to the parties supporting those candidates. F.E.C. Brief, 43; Common Cause Brief, 39. Similarly, individuals may contribute finan-

cially to the national, state and local party committees which engage in activities in support of the presidential candidates. Common Cause Brief, 40; F.E.C. Brief, 44.[4]

Persons who identify with the political parties and who agree to associate themselves with the campaign structures operated by the candidates can certainly enjoy these party/candidate controlled avenues of expression. However, those individuals who do not wish

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[4] Appellants' discussion of citizen contributions to political parties leaves the impression that such contributions automatically will be used to support the presidential candidates favored by the contributor. Thus, Common Cause states, first, that "all persons [are] free to help a publicly financed candidate by contributing money to his party's national committee, which may *in turn* spend up to a specified limit . . . to promote the party's national ticket . . .," and second, that "[e]very individual can also help a publicly financed candidate by contributing money to his party's state and local committees which may *in turn* use as much of their money as they wish to support the candidate . . .." Common Cause Brief, 40 (emphasis added). See F.E.C. Brief, 44.

Neither appellant mentions that 2 U.S.C. § 431(9)(B)(viii) prohibits state and local party committees from making expenditures with money contributed by donors who designate that the contribution be spent for a particular candidate. According to 11 C.F.R. § 100.8(b)(16)(iii), a contribution is not considered as "designated, if the party committee disbursing the funds makes the final decision regarding which candidate(s) shall receive the benefit of such disbursement."

It is ironic that appellants point approvingly to a scheme by which individuals must surrender ultimate control over the disbursement of their contributions to political party, and yet argue that individuals are not free to associate together, using delegated authority in order to make independent expenditures, without falling subject to Section 9012(f)'s limitations.

to be affiliated with the existing parties or authorized committees cannot conscientiously use these methods for self-expression. The large numbers of persons so affected is indicated by the high number of independent voters in the nation.

Even service in a preferred candidate's campaign may not be an acceptable option for an "independent." Such a voter may not wish to associate with a campaign and thereby possibly be identified with a particular party. Or he may not choose to restrict his support to the particular strategy and program of the candidate-controlled campaign. Moreover, he may even wish to take positions and express himself in a manner not particularly to the liking of the candidate. Obviously an independent route of expression is necessary for such individuals.

Although an individual may wish to engage in volunteer activities, personal limitations may make campaign involvement impossible. Persons who work long hours or have health problems or other limiting characteristics cannot reasonably be expected to serve as party workers or fulfill active campaign obligations.

In sum, personal participation in and financial support of candidate and party-controlled political committees do not provide reasonable alternatives to many citizens. In any event, whether or not a voter chooses to avail himself of such options, they still do not provide the opportunity of achieving the meaningful impact of electronic and print mass media and cannot be regarded as meaningful substitutes.

Southeastern submits that this Court's holding in

Buckley, that the First Amendment prohibits limitations upon independent expenditures, is as correct today as it was in 1976. In their pursuit of meaningful free speech, both individuals and the independent political committees they support should be protected from any congressional attempts to limit political debate in presidential campaigns in a manner which favors certain citizens to the detriment of others.[5]

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[5] This Court's consideration of Section 9012(f) comes at a time when the major parties have declared themselves against independent political committee exepnditures and may support even more restrictions on them. Mr. Richard Richards, Chairman of the Republican National Committee has described the system of independent expenditures as "fraught with mischief" and has called for further controls upon it. N.Y. Times, April 26, 1981, § 1, at 22. Mr. Charles Manatt, Democratic National Chairman, has appointed a task force "to investigate the impact of these groups that answer to nobody and have a great evil influence on our society." Wash. Post, May 6, 1981, at A6.

If this Court upholds Section 9012(f), and even further controls upon independent political expression are enacted, free and effective debate in presidential campaigns will be left to only the candidates, their parties and the news media. Southeastern does not believe such a siutation would be consistent with the Constitution's guarantee of freedom of speech for citizens in the political process. This Court has already recognized that " 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " First National Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978). Limitations on independent political committees and their supporting citizens undermine such free discussion.

C. The Burdens Placed Upon The Constitutional Right Of Free Expression By Section 9012(f) Are Not Justified By A Compelling Governmental Interest In Eliminating Corruption From The Electoral Process.

Inasmuch as Section 9012(f) significantly interferes with the exercise of the freedoms of speech and association by individuals and independent political committees, the statute can survive only if justified by a compelling governmental interest. The constitutionality of Section 9012(f) "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley, supra* at 44.

Common Cause and F.E.C. argue that Section 9012 (f) is justified because it is consonant with the governmental interests associated with the establishment of the Fund Act. The primary thrust of this justification is that the limitation upon independent expenditures serves to eliminate corrupting influences from the presidential election process. F.E.C. argues that "Congress designed the Fund Act to eliminate the appearance and possibility of political *quid pro quos* prevalent in privately financed presidential campaigns and to foster individual participation and public discussion in the electoral process." F.E.C. Brief, 8-9. Similarly, Common Cause asserts that "[o]nly Section 9012(f) is available to meet the threat that a publicly financed candidate, wittingly or unwittingly, will be put under heavy obligation to the managers of political committees who raise and spend millions of additional

dollars to help him get elected." Common Cause Brief, 23.

Running through the position taken by both appellants is the notion that independent political committee expenditures somehow evade or circumvent the intention of Congress to prohibit contributions to publicly funded candidates and thereby raise the possibility of an impermissible corrupting influence. This theme is evident when F.E.C. says that Section 9012(f) "assures that federal funds received by presidential candidates are not a mere supplement to private financing," F.E.C. Brief, 10, and where Common Cause asserts that Section 9012(f) "prevents evasion of the Fund Act's ban on private contributions to . . . publicly financed presidential candidates." Common Cause Brief, 30.

Common Cause and F.E.C. unreasonably assume that independent political committees cannot, in fact, function independently of presidential candidates, and that they necessarily function in coordination with presidential candidates. By alleging vague connections between specific "independent" political committees and presidential candidates as sufficient to show corrupting influence and links, appellants ignore the holding of this Court as to the distinction between independent and non-independent expenditures. In *Buckley, supra* at 46-47, while striking down a statute similar to Section 9012(f) in its effect, this Court wrote that there is a distinction between "expenditures controlled by or coordinated with the candidate and his campaign," and those "expenditures made totally independently of the candidate and his campaign." This Court

found that the former type of expenditures should be "treated as contributions" under the Federal Election Campaign Act of 1971.[6] The latter type of expenditures are consequently to be treated as "independent" and should not be thought of as having the potential for corruption.

The defect of appellants' theory and likewise the defect of Section 9012(f) is that they cover the activities of *all* "independent" political committees, whether or not a particular group is genuinely independent of a candidate. Since Section 9012(f) applies to all expenditures in excess of $1,000 furthering the election of presidential candidates, without regard to the true character of the expenditures, it catches in its net both the good and the bad fish.

Contrary to the characterization of Section 9012(f) urged by appellants, the statute is *not* narrowly tailored to achieve a compelling governmental interest. As with the statute in *Buckley*, Section 9012(f) includes restrictions upon expenditures which "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley, supra* at 47. Such expenditures, lacking direct contact with or influence from a candidate, "undermine . . . the value of the expenditure[s] to the candidate, but also alleviate . . . the danger that expenditures will be

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[6] Southeastern agrees with the District Court that expenditures which are in reality contributions to a candidate should be treated as such and can be dealt with by the F.E.C. through its enforcement powers. Opinion of District Court, Common Cause's Jurisdictional Statement at 13a, 25a.

given as a *quid pro quo* for improper commitments from the candidate." *Buckley, supra* at 47.

Through its overly broad coverage of independent political committee expenditures, Section 9012(f) fails, as did the statute in *Buckley*, "to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process . . . [and] it heavily burdens core First Amendment expression." *Id.* at 47-48. Even though Congress may properly seek to eliminate corruption in the electoral process, it must do so only through means which impose the least burden upon constitutionally protected liberties. Congress has simply gone too far in pursuit of its goal by enacting a law which restricts liberties and activities unnecessary to the achievement of that goal.

Without a substantial governmental interest to counterbalance the drastic restrictions Section 9012(f) places upon the exercise of free speech and free association by independent political committees and the individuals who support them, Section 9012(f) is unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court below, holding that 26 U.S.C. § 9012(f) violates the First Amendment to the Constitution of the United States.

Respectfully submitted,

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